

INQUIRY CONCERNING A ) Supreme Court  
JUDGE, NO. 02-487 ) Case No. SC03-1171  
\_\_\_\_\_) )

The Florida Judicial Qualifications Commission ("the Commission"), by and through its undersigned Special Counsel, hereby replies to the Respondent's Motion to Dismiss as follows:

1. Judge Holder, in his motion, contends that the Commission's charges against him should be dismissed because of a December 19, 2003 decision of the Air Force resolved in his favor allegations regarding his military conduct. On May 13, 2003, the Air Force Judge Advocate General suspended Judge Holder's designation by the Air Force as a judge advocate and on December 19, 2003, restored the designation (the letter restoring Judge Holder's Judge Advocate designation is attached as Exhibit 1 to Judge Holder's Motion to Dismiss).

2. Under Air Force Instruction 51-103, entitled "Designation and Certification of Judge Advocates," a copy of

which is attached hereto, the procedure for withdrawal of the designation of Judge Advocate is set forth in Sections 4.2-4.6. In addition, the Air Force looks for guidance to the Manual for Courts-Martial of the Uniform Code of Military Justice and, specifically, to Rule 109 relating to "Professional supervision of military judges and counsel," which provides that in taking professional disciplinary action, the Judge Advocate General "shall find in writing that the subject of the complaint engaged in judicial misconduct or is otherwise unfit for continued service as a military judge and that such misconduct or unfitness is established by clear and convincing evidence." A copy of Rule 109 is also attached hereto.

3. The Judge Advocate General of the service in which the officer is serving has the sole authority to suspend or disbar a judge advocate and such a decision is made upon an investigation and written record with the officer being given an opportunity to be heard. There is no trial and no presentation and cross-examination of witnesses. Judge Holder, in the motion to dismiss, states that the Air Force decision "resolves in [his] favor the allegations regarding his military conduct," but the letter from Major General Thomas J. Fiscus, the Judge Advocate General of the Air Force, simply states:

Having fully considered all materials presented to me or submitted by you regarding your duty specialty code status, I am today restoring your designation as a judge advocate, which was previously suspended on 13 May 03.

The letter makes no findings or conclusions, does not explain the reasoning behind the decision, does not refer to the clear and convincing standard of proof and, therefore, does not necessarily mean that the Judge Advocate General resolved the allegations regarding Judge Holder's military conduct in his favor.

4. Judge Holder cites several cases for the proposition that the military constitutes a special community governed by a separate discipline than that of the civilian community and that an orderly government requires that the judiciary scrupulously avoid interfering with legitimate military matters. The cases, however, cited by Judge Holder do not support his position. In Von Hoffburg v. Alexander, 615 F.2d 633 (5<sup>th</sup> Cir. 1980), Marie Von Hoffburg was honorably discharged by the United States Army because of alleged homosexual tendencies when she married a transsexual of the female gender and sought Army benefits as a married couple. Following her Army discharge, Von Hoffburg filed a federal suit seeking to enjoin the Army for failing to recognize her marriage and from permanently discharging her. She also sought monetary damages. The Fifth Circuit Court of Appeals

held that Von Hoffburg was obligated to exhaust her administrative remedies within the Army with respect to her claims for declaratory and injunctive relief, but reversed the dismissal of the monetary damages claim because it was not within the scope of the remedies which the Army was empowered to award. The Commission, by proceeding with its case against Judge Holder, does not do violence to the teachings of Von Hoffburg and will not interfere with any legitimate Air Force matter because only the Commission has the power to discipline Judge Holder in his capacity as a state judge and, like the monetary damage claim in Von Hoffburg, it is exclusively within the jurisdiction of this civilian proceeding.

Judge Holder also cites Neal v. State, 135 So.2d 891 (Fla. 1<sup>st</sup> DCA 1961), for the proposition that judicial comity allows a tribunal to give effect to decisions of another jurisdiction out of deference and respect. This is certainly the law, but in that case, the court held that Florida public policy impelled the view that a decree of a foreign jurisdiction involving custody of minor children must give way to a Florida decree based upon the minors' best interest. So, here, the decision of the Judge Advocate General cannot supplant the duty and obligation of the Commission to

determine whether Judge Holder, in the best interest of the Florida judiciary, should be disciplined.

5. Canon 2A of the Code of Judicial Conduct provides that "a judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." It is the responsibility of the Commission to enforce this Canon and to bring proceedings relating to any conduct, including that involving military service, which would impair public confidence in the integrity of the judiciary.

6. Counsel for the Commission has reviewed the evidence developed in the investigation and disclosed during discovery in this case and believes that the evidence would support a finding, based upon clear and convincing evidence standard, that Judge Holder is guilty of the charges set forth in the Formal Charges.

WHEREFORE, the undersigned Special Counsel requests that the Motion to Dismiss be denied and the matter reset for an evidentiary hearing on the Formal Charges.

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Certificate of Service

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to each of the following by Facsimile and United States Mail this \_\_\_\_\_ day of February, 2004.

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